

ESTATE OF MICHAEL J. DALTON

: Order Vacating Decision and
: Remanding Case for Further
: Consideration
:
: Docket No. IBIA 92-81
:
: September 1, 1992

Appellant Myrna Lambert seeks review of an April 19, 1991, order determining heirs and an October 3, 1991, order denying rehearing, both of which were issued by Administrative Law Judge William E. Hammett in the Estate of Michael J. Dalton, IP SA 349N 88. For the reasons discussed below, the Board of Indian Appeals (Board) vacates those orders, and remands this matter to Judge Hammett for further consideration of the question of whether decedent was the father of LaTanya Gentry.

Decedent, a Tlingit, was born on February 24, 1955, and died on January 7, 1986. Judge Hammett held two hearings to probate decedent's trust or restricted estate: 1/ the first on April 27, 1989, in Anchorage, Alaska; the second on September 27, 1990, in Kake, Alaska. At the first

1/ In a June 18, 1991, order, Judge Hammett described the extent of decedent's trust or restricted property, over which the Department of the Interior has probate authority:

"[T]his forum has no jurisdiction to determine or direct distribution of any shares of stock the decedent may have owned in any village or regional native corporation. This forum's jurisdiction is limited to determination of heirship of the decedent's Native trust or restricted property, which appears to be an undivided one-fifth interest in restricted townsite Lot 9, Block 6, U.S. Survey 3851, Kake Townsite, Alaska."

See 43 U.S.C. § 1606(h)(2)(A) (1988) ("Upon the death of a holder of [Alaska Native Claims] Settlement [Act Regional Corporation] Common Stock, ownership of such stock * * * shall be transferred in accordance with the lawful will of such holder or pursuant to applicable laws of intestate succession"); 43 U.S.C. § 1607(c) (1988) (providing for the same transfer of Village Corporation stock); H. R. Rep. 92-523, 92nd Cong., 1st Sess. (Sept. 28, 1971), reprinted in 1971 U.S. Code Cong. & Admin. News 2192, 2199 ("The [Alaska Native Claims Settlement Act] does not establish any trust relationship between the Federal Government and the Natives. The regional corporations and the village corporations will be organized under State law, and will not be subject to Federal supervision except to the limited extent specifically provided in the [Act]. All conveyances of land will be in fee--not in trust").

hearing, information relating to decedent's family history was taken. It was undisputed that decedent had never married. The testimony offered indicated that family members did not acknowledge that he had any children. During the course of the hearing, the Judge noted: "[I]t's been reported to my office that [decedent] had a daughter LaTanya Gentry. * * * [We'll] continue with the hearing here today, but I am going to have to look into the source of this report because * * * I have to develop that" (Apr. 7, 1989, Transcript at 2-3). At the second hearing, additional testimony was taken concerning whether or not decedent was LaTanya's father.

The Board has carefully reviewed the testimony at both hearings, the documents in the probate record, and the filings during this appeal. The Judge conducted most of the questioning at both hearings. ^{2/} No party was represented by counsel at the second hearing. At that hearing, LaTanya's mother, Cheryl (White) Rose, testified concerning her relationship with decedent. In response to questions posed by Judge Hammett, Rose testified:

Q When you moved back to Alaska, did you move to Kake, Alaska?

A Yes, I did.

Q Did you live with Michael Dalton?

A Yes, I did.

Q For what period of time did you live with him?

A We lived together for about a month. He got in trouble with the police here and he stayed over at my place for about a month.

Q Do you recall * * * that period of time when * * * he lived with you?

A No, I don't. I don't remember.

Q Okay was that in 1975?

A That would have to be around there, yes.

(Sept. 27, 1990, Transcript at 11). In his April 19, 1991, order, the Judge summarized this testimony: "Cheryl White, LaTanya's mother, testified * * *

^{2/} This practice is not unusual, especially when parties are not represented by counsel. As the Board stated in Estate of Wesley Emmett Anton, 12 IBIA 139, 142 (1984),

"When individuals [in a probate proceeding] are not represented [by counsel], the Administrative Law Judge bears a greater burden of ensuring that all relevant facts are brought out at the hearing and that the proper legal standards are followed in the decision. Estate of Katie Crossguns, 10 IBIA 141, 144 (1982). In addition, the Board has stated that the Administrative Law Judges involved in the probate of Indian estates share the duty imposed upon the Department of the Interior to carry out the Federal trust responsibility to all Indians. ^{x/} Estate of Helen Ward Willey, 11 IBIA 43, 47 (1983).

^{x/} This responsibility is independent of, and in addition to, the responsibility of an Administrative Law Judge to ensure the full development of the evidence and legal arguments in a non-adversarial proceeding * * *."

that she had lived with the decedent for about a month during the period of time within which LaTanya could have been conceived" (Order at 1). 3/ The Board believes this summarization overstates Rose's actual testimony.

In addition, the record contains a May 8, 1989, letter to the Judge from then counsel for appellant. The letter was written in response to a request from the Judge for further information concerning the testimony Joyce James was expected to give. 4/ It states in part:

Ms. James also said that she had always understood that LaTanya Gentry was the child of Donald Demmert who died this past January. She believed that to be the case because Donald's wife Kathy told her Donald was having an affair with Cheryl White about the time Ms. White became pregnant with LaTanya. She believes that was the cause of the divorce of Kathy and Donald Demmert which occurred at about that time. She could not tell me where Kathy Demmert lives now but she said a woman named Bernice Applegate may know where Kathy is living. Ms. James also said that Cheryl White's actions at that time convinced her that the child was Mr. Demmert's.

(Letter at 1-2).

Even though the Judge was aware that James was intending to testify about the relationship between Rose and Demmert, he failed to ask her any questions on that subject. 5/ Instead, he asked such questions only of Rose, after James left the hearing. Although the Judge gave other parties an opportunity to question the witnesses, an examination of the entire probate record reveals a high probability that he may have unintentionally led the parties to believe that he was solely responsible for conducting the inquiry and would elicit all information necessary for a decision.

Under these circumstances, the Board invokes its authority under 43 CFR 4.318 "to correct a manifest injustice or error where appropriate." In this case, manifest injustice or error resulted from the Judge's over-reliance on Rose's equivocal testimony and failure to address fully matters that were within his knowledge.

The Judge's failure to inquire more fully into the relationship between Rose and Demmert distinguishes this case from others in which the

3/ LaTanya was born on Jan. 18, 1976.

4/ Appellant's counsel stated in an Apr. 30, 1992, affidavit that she had requested that James' testimony be taken by telephone during the second hearing. Counsel stated that the Judge indicated that he was reluctant to take testimony over the telephone, and that he requested the summarization of testimony "so that he could send interrogatories to Ms. James."

5/ Although at least part of James' "testimony [may have been] hearsay, hearsay testimony of family relationships is admissible in Departmental probate proceedings." Estate of Henry W. George, 15 IBIA 49, 52 (1986). See also cases cited therein.

Board has held that, even when a party is not represented by counsel, the party is required to raise all issues at the hearing, and that the Judge is not required to anticipate arguments or factual matters that a party might wish to raise. Cf., e.g., Estate of Henry Beavert, 18 IBIA 73, 75 (1989); Estate of Clarence Thompson Burke, 18 IBIA 1, 3 (1989). Here, the question of whether Demmert could have been LaTanya's father had been raised, but the Judge failed to pursue it in a manner that was conducive to eliciting full information. Had the Judge fully questioned James, he might have determined that a continuance of the hearing was necessary in order to permit an opportunity to locate Kathy Demmert. 6/

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the April 19 and October 3, 1991, orders issued by Administrative Law Judge Hammett are vacated and this matter is remanded to the Judge for further consideration of the question of the paternity of LaTanya Gentry. 7/

Kathryn A. Lynn
Chief Administrative Judge

Anita Vogt
Administrative Judge

6/ Mrs. Demmert was eventually located in Seattle, Washington, by relatives of appellant. A July 9, 1991, affidavit from her formed the basis for appellant's petition for rehearing.

7/ Because the Board has determined that there was error in the original hearing, it does not reach any issue relating to the petition for rehearing. Appellant's motion to supplement the record, taken under advisement on May 27, 1992, should be addressed on remand.

The Board notes that the record contains a May 4, 1989, letter from Rose to the Judge in which she states:

"I DO NOT want LaTanya's name on the Dalton property. Many people have died on this piece of property. Several of the Dalton family died on this property. Before they moved on this property, several people were shot on this same piece of property. I have very bad feelings about the Dalton property. Sir, all I want is Michael's shares for his daughter. * * * I hope I'm not wrong in doing this, but I am going to write a letter to [appellant], explaining to her that I DO NOT want my daughter's name on the Dalton property" (Letter at 1-2; emphasis in original).

It thus appears possible that the only property over which the Department has jurisdiction, decedent's undivided interest in a Native allotment, see note 1, supra, is property which Rose, as LaTanya's guardian ad litem, does not want her daughter to receive.